

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HENRY LOPEZ,

Defendant and Appellant.

G040148

(Super. Ct. No. 97WF2746)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Thomas James Borris, Judge. Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

*

*

*

Henry Lopez appeals from an order denying his motion to modify a restitution fine imposed as part of a criminal judgment that became final in March 2003. Because the trial court lacked jurisdiction to modify the fine, we affirm the court's order.

I

FACTS AND PROCEDURAL BACKGROUND

Convicted of first degree murder in 2000, the trial court ordered defendant to serve 26 years to life in prison. In December 2002, we affirmed the judgment in an unpublished opinion (*People v. Lopez* (Dec. 31, 2002, G027444)) and the remittitur issued on March 25, 2003. Lopez did not raise any issue concerning restitution on appeal.

In February 2008, Lopez filed a motion in propria persona from prison. He made several claims related to the restitution fine and an order for victim restitution. He acknowledged he had not objected to the restitution orders at the sentencing hearing but argued the orders were unauthorized. Specifically, he contended the "trial court erred by imposing a restitution fine . . . in excess of \$10,000." He also argued the victim failed to timely file paperwork necessary to claim reimbursement from the state restitution fund, and therefore requested the court to reduce the restitution fine to the \$200 minimum.

The court denied the motion in a minute order without a hearing on February 25, 2008, explaining, "Defendant was ordered to pay the fines at his sentencing hearing in 2000. Absent statutory authority or other legal grounds, 'the court loses resentencing jurisdiction when execution of sentence begins.' [Citation.] The court has no jurisdiction to modify Defendant's sentence now. Defendant's motion is DENIED."

Defendant filed a notice of appeal. In the notice, he stated he "was not aware that he had the right to contest the restitution order let alone, that he could . . . offer[] an argument on his own behalf with regards to the amount involved and imposition thereafter." He argued the trial court erred by concluding he could not contest

the restitution order because the sentence was unauthorized. We appointed counsel for defendant on appeal.

II

DISCUSSION

Defendant contends the trial court denied his request to modify the restitution fine on the mistaken assumption the court could not reconsider imposition of the fine. Assuming the trial court had the requisite jurisdiction to entertain his motion, defendant argues the court erred in declining to consider his ability to pay. Counsel asserts we should modify the fine to the statutory minimum of \$200 or remand for the trial court to reconsider the motion. We conclude the court correctly determined it lacked jurisdiction to reconsider the matter.

“““[J]urisdiction may be concisely stated to be the right to adjudicate concerning the subject matter in a given case.” [Citations.] [¶] Jurisdiction in any proceeding is conferred by law; that is, by the constitution or by statute.’ [Citation.] ‘[A court] cannot exercise jurisdiction in any instance until after it has acquired it, and it can acquire it only in the mode prescribed by statute.’ [Citation.]” (*People v. Ainsworth* (1990) 217 Cal.App.3d 247 (*Ainsworth*).)

Courts possess limited authority to modify a sentence once imposed. (See, e.g., Pen. Code, § 669; all statutory references are this code unless otherwise noted [sentencing court has 60 days from commencement of imprisonment to determine whether subsequent term shall run concurrently or consecutively]; § 1170, subd. (d) [court on its own motion may recall sentence within 120 days of the date of commitment or on recommendation of secretary or the Board of Parole Hearings]; *People v. Willie* (2005) 133 Cal.App.4th 43, 49 [sentencing court’s authority to modify restitution fine expires after 120 days].) Generally speaking, once a defendant begins serving a sentence, the sentencing court loses jurisdiction to modify it. (*People v. Howard* (1997) 16 Cal.4th 1081, 1089; *People v. Karaman* (1992) 4 Cal.4th 335, 344, 347, 350.) The court,

however, may correct an unauthorized sentence whenever the error comes to its attention. (*In re Harris* (1993) 5 Cal.4th 813, 842 (*Harris*).)

The record from the previous appeal does not support defendant's claim the trial court imposed an unauthorized sentence when it ordered a restitution fine in excess of \$10,000. Rather, the record reflects the court imposed a \$5,200 restitution fine under section 1202.4, subdivision (b). A sentence is unauthorized if it could not "lawfully be imposed under any circumstance in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) Here, the court's restitution order did not exceed the maximum amount authorized under the statute and therefore did not constitute an unauthorized sentence.

Section 1202.4, subdivision (b)(1), provides that, "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. [¶] The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars (\$200), and not more than ten thousand dollars (\$10,000), if the person is convicted of a felony" (§ 1202.4, subd. (b)(2) [court *may* determine amount of fine as the product of \$200 multiplied by number of years of imprisonment].) In setting the amount of the fine in excess of the minimum, the court *shall* consider any relevant factors including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime. (§ 1202.4, subd. (d); § 1202.4, subd. (c) [defendant's inability to pay *may* be considered in increasing the amount of the restitution fine in excess of the \$200 minimum; defendant bears the burden of demonstrating his or her inability to pay].) Clearly, section 1202.4 *authorized* the sentencing court to impose a \$5,200 restitution fine.

Defendant contends section 1202.4, subdivision (f), allows the trial court to modify its restitution order after the judgment becomes final. This section requires “the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court.” The defendant has the right to challenge the amount of restitution in a contested hearing. (§ 1202.4, subd. (f)(1).) “The court may modify the amount, on its own motion or on the motion of the district attorney, the victim or victims, or the defendant.” (*Ibid.*)

Section 1202.4, subdivision (f), does not support defendant’s argument the trial court may modify the amount of a restitution fine after pronouncing judgment. The section applies only when the court orders direct restitution to the victim, not when the court imposes restitution fines. The section authorizes the court to modify a final restitution order only if the original order was invalid. (See § 1202.46 [trial court’s failure to find a compelling and extraordinary reason for not imposing a restitution order or fine is invalid and may be corrected “at any time”]; *People v. Moreno* (2003) 108 Cal.App.4th 1, 9-10.)

Defendant also cites section 1260, which authorizes a reviewing court to “reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and” to “set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.” The section is limited to judgments and orders “appealed from”; it does not authorize modification of final judgments and orders.

Relying on Code of Civil Procedure section 1008, defendant argues “a restitution fine has civil overtones [and] civil orders can be modified when a party can establish a reason for not bringing the basis for modification to the court earlier.” Code of Civil Procedure section 1008 does not apply in criminal cases. (*People v. Castello* (1998) 65 Cal.App.4th 1242, 1246-1247 [noting in criminal cases there are few limits on a court’s power to reconsider *interim* rulings].) Moreover, while Code of Civil Procedure section 1008 empowers a court to reconsider modify, amend, or revoke prior interim orders under specified circumstances (Code Civ. Proc., § 1008, subd. (g)), it does not authorize motions to reconsider entered judgments as opposed to mere orders. True judgments are vulnerable to attack for judicial error only by prescribed procedures. (*Passavanti v. Williams* (1990) 225 Cal.App.3d 1602.)

Simply put, the trial court lacked jurisdiction to entertain defendant’s postjudgment motion to modify the restitution order. In *Ainsworth*, the appellate court rejected a defendant’s postjudgment discovery motion, explaining that no decisional or statutory authority authorizes a trial court to hear a postjudgment motion “which is unrelated to any proceeding then pending before the court. The reason for such lack of authority is simple. As with any other motion, a discovery motion is not an independent right or remedy. It is ancillary to an ongoing action or proceeding. After the judgment has become final, there is nothing pending in the trial court to which a discovery motion may attach.” (*Ainsworth, supra*, 217 Cal.App.3d at p. 251.) Thus, once a criminal proceeding is final in the trial court, that court’s subsequent direct jurisdiction over the case is strictly limited by the appellate remittitur and statute. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1257.) Here, the remittitur did not authorize a restitution hearing because defendant failed to raise the issue on appeal. Nor has defendant cited any statutory authority that confers jurisdiction on the trial court to conduct a postjudgment restitution hearing.

Defendant's attempt to distinguish *Ainsworth* is unavailing. Defendant argues *Ainsworth* rejected the defendant's postjudgment discovery motion because the request would place an enormous burden on the trial court. Although *Ainsworth* noted in passing that postjudgment discovery rights for every convicted defendant would "bury the [trial] courts under a blizzard of paper," the court made clear its decision was based on the defendant's failure to show the trial court had jurisdiction to hear the matter. (*Ainsworth, supra*, 217 Cal.App.3d at p. 259.) Following *Ainsworth's* guidelines, we conclude defendant has failed to demonstrate the trial court had jurisdiction to hear his postjudgment restitution motion.

Finally, defendant requests we treat his appeal as a petition for a writ of habeas corpus. Defendant explains "[he] was not a native English speaker, being from El Salvador[, and a]s he stated in his motion for modification, he was not aware of the restitution fine or that he could ask for a lesser amount. After 8 years in prison, realizing the extreme impact upon his situation of having much of what he had go for payment of a fine, he chose to ask for a modification of the judgment."

We decline to treat his appeal as a habeas petition for several reasons. A writ of habeas corpus addresses "errors of a fundamental jurisdictional or constitutional type only." (*Harris, supra*, 5 Cal.4th at p. 828.) As discussed above, defendant has not shown the trial court's restitution order was unauthorized, and he has not raised any constitutional claims attacking the order. Moreover, "an unjustified failure to present an issue on appeal will generally preclude its consideration in a postconviction petition for a writ of habeas corpus." (*Id.* at p. 829.) Defendant suggests his difficulty with the English language prevented him from understanding the significance of the restitution order, but he fails to offer evidence to support his claim. Finally, defendant fails to explain why he waited eight years before seeking relief. A habeas petitioner must file the petition "as promptly as the circumstances allow, and the petitioner 'must point to particular circumstances sufficient to justify substantial delay . . .'" (*In re Clark* (1993) 5 Cal.4th

750, 765, fn. 5.) Delay is measured from the time a petitioner knew, or reasonably should have known, the information in support of the claim and the legal basis for the claim. (*In re Robbins* (1998) 18 Cal.4th 770, 780.) Although defendant was subject to the fine since his 2000 sentencing hearing, he waited eight years before raising the issue, and offers no explanation for the delay. Under these circumstances, we cannot treat his appeal as a petition for writ of habeas corpus.

III

DISPOSITION

The order is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, ACTING P. J.

MOORE, J.